IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 172 OF 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
BHAGWATI FOUNDERIES LTD. - Opponent(s)

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Appearance :
MR. TANVISH U. BHATT for Applicant(s).
NONE for Opponent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 26/07/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Heard Mr.Tanvish U.Bhatt, learned Counsel for the Revenue, at whose instance, the following questions

has been referred to this Court for our opinion :

> “1) *Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.79,711/- being provision made for payment of privilege leave due to employees?*
>
> 2) *Whether the Appellate Tribunal's decision does not run contrary to the decision of the Hon'ble Supreme Court in the case of Indian Molasses 37 ITR 667?”*

Office Report shows that the opponent is served. Nobody appears for him.

We proceed to decide the matter.

2. The Assessee is a Limited Company manufacturing iron castings. The Income Tax Officer (ITO) noted that during the year under consideration, the assessee made provision for encashable privilege leave amounting to Rs.79,711/-. The ITO was of the opinion that the claim of deduction was not acceptable as it was a mere provision, which makes an employee to claim encashment of his leave,

which he may encash or avail depending upon particular circumstances. The ITO was also of the opinion that the payment had not become due as it would become due only when the employee makes an application and seeks to get encashment of unutilised leave. The ITO observed that the assessee could not foresee a situation wherein all the employees or some employee would make an application seeking encashment of the unutilised leave. He, accordingly, disallowed the claim.

2.1 Being aggrieved by the said order, the assessee preferred an appeal to the Commissioner of Income-Tax (Appeals). The matter, thereafter, went to the Tribunal. After hearing the parties and placing its strong reliance upon a judgement of the Apex Court in the case of ***Metal Box Company of India Limited vs. Their Workmen***, reported at ***73 I.T.R 53***, the Tribunal held that the amount was deductible from the returned income.

2.2 The judgement of the Tribunal being not acceptable to the Revenue, they made an application for reference. The Tribunal, accordingly, made a reference to this Court under Section-256(1) of the Income Tax Act, 1961 (“the Act” for short).

3. Mr.Tanvish U.Bhatt, learned Counsel for the Revenue, submitted that there is a sharp conflict in the judgements of the Supreme Court in the matter of ***Indian Molasses Co. (Private) Ltd. vs. Commissioner of Income-Tax, West Bengal*** [***37 I.T.R. 66***] and ***Metal Box Company of India Ltd. vs. Their Workmen*** [***73 I.T.R. 53***]. He, however, also referred to a judgement of the Supreme Court in the matter of ***Bharat Earth Movers vs. Commissioner of Income-Tax*** [***245 I.T.R. 428***].

4. It is to be seen that in the matter of ***Indian Molasses*** (*supra*), the question before the Court was that what would be the meaning of the word “expenditure” and in a case where some amount is transferred to the trustees to take out annuity policy on the life of the Managing Director or longest life policy in favour of the Managing Director and his wife, the Court observed that payment of those sums was a paying out or away of those sums irretrievably and did not amount to “expenditure”, and a deduction could not be made in respect thereof under Section-10(2)(xv).

5. It is to be seen that in the matter of ***Calcutta Co. Limited vs. Commissioner of Income-Tax, West Bengal*** [***37 I.T.R. 1***], the Supreme Court was considering a

matter where certain amount, for being spent in future in accordance with the liability, was kept apart and deduction was claimed. The matter went upto the Apex Court and the Apex Court held that undertaking imported a liability on the appellant which accrued on the dates of the deeds of sale, though that liability was to be discharged at a future date and as the liability had already accrued, the amount was deductible. It is also to be seen that in the matter of ***Metal Box Company of India Limited*** (*supra*), the Apex Court was considering a question that where the liability under a scheme of gratuity in respect of the accounting year is stated in the profit and loss account, in the absence of any challenge by the workmen to the correctness of the method of valuation and in the absence of a challenge that such liability cannot be estimated on any fair standard, the amount claimed according to the profit and loss account should be presumed to be genuine and allowed. The Court also observed that if any amount is kept apart for discharging such liability relating to the gratuity, it cannot, therefore, be termed as a `reserve'. The Apex Court, ultimately, held that such an amount deserved to be deducted from the net income.

6. In all the three cases referred to above, the

Supreme Court was faced with different prepositions, but, at least in two of the cases, the Apex Court was of the opinion that if the money is kept apart to meet the future liability, which is to be discharged in accordance with law, then, keeping apart of that amount would not be a reserve, but, would be a deductible expenditure.

7. In the matter of ***Bharat Earth Movers*** (*supra*), the Supreme Court had considered the matter in relation to the amount, which was kept apart to meet the liability relating to leave encashment of the employees. In an identical situation, the Supreme Court had observed that such liability is not a contingent liability and the amount kept apart to discharge such liability would be deductible.

8. Question No.1, in view of the said judgement of the Supreme Court in the matter of ***Bharat Earth Movers*** (*supra*), is decided against the interest of the Revenue.

9. So far as Question No.2 is concerned, it would be necessary to note that it is settled and established practice in the Courts of law that if there are two judgements of the Apex Court, presided over by equal number of Judges, then, the Court or the Tribunal can

follow either of the judgements, which is more near to the facts of the said case and if both the judgements of the Apex Court are in an identical situation, then, under the circumstances, the Tribunal or the Court would be entitled to follow one of the judgements because it is not expected of any Court or the Tribunal subordinate to the Apex Court in the judicial hierarchy to say that one of the judgement delivered by the Apex Court is wrong. The Tribunal was justified in placing its reliance upon the judgement of the Supreme Court in the matter of ***Metal Box Company of India Limited*** (*supra*). Though Question No.2 had become academic, but, as it was argued before us, we have to answer it. We, accordingly, hold that the Tribunal was not unjustified in placing its reliance on the judgement of the Apex Court in the matter of ***Metal Box Company of India Limited*** (*supra*) in preference to the judgement of the Apex Court in the matter of ***Indian Molasses*** *(supra)*. Accordingly, the Reference stands disposed of. No costs.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

*kamlesh**